BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES D. CASEY	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,029,434
	)	
YORK INTERNATIONAL	)	
Self-Insured Respondent	)	

ORDER

The self-insured respondent requests review of the August 14, 2006, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge (ALJ) found that claimant had proven it was more likely true than not true that he was injured while working for respondent and that his injury arose out of and in the course of employment.

The respondent requests review of whether the claimant's accidental injury arose out of and in the course of employment. Respondent argues the claimant's injury resulted from walking, which is a daily living activity pursuant to K.S.A. 2005 Supp. 44-508(e). Respondent also contends that since claimant admitted aggravating his right knee while bowling after the date of the alleged work injury, the "last injurious exposure approach" would relieve it of liability for any medical treatment after the intervening injury.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant is 63 years old and has been working for respondent for over 42 years. His current job entails running a forklift. Claimant testified that on April 7, 2006, he entered his work area and carried his lunch box to his forklift. He set the lunch box on the forklift and commenced to walk to the time clock to clock in. As he walked, he stepped over a conveyor where a walk plate was placed. As he stepped down, his right leg went sideways and he felt pain in his right knee. Claimant reported the injury to his supervisor, Gordon

Young, specifically telling him that he had stepped over the conveyor on the walk plate. Mr. Young sent him to the nurse, Sharon Poer. Claimant also testified that he told Ms. Poer that he stepped down over a conveyor when he injured his right knee.

Ms. Poer wrapped claimant's knee and told him that he would need to see his personal physician. Claimant called his wife, who scheduled him to see Dr. William Simon the same day as his injury. Claimant testified that he told Dr. Simon that he twisted his leg when he stepped off a walk plate that was over a conveyor at work. There was, however, no mention of him stepping off a conveyor in Dr. Simon's record of April 7, 2006. That report states: "R knee pain x 2-3 weeks– felt like snapped. Walking normal when it happened."[1] Claimant stated he told Dr. Simon that before he walked over the conveyor, he was walking normally.

About a week after the April 7 incident, claimant was contacted by respondent's insurance carrier and gave a recorded statement in which he stated: "I was stepping over the conveyor line, where we have a walk . . . walkway, and when I stepped down my knee went sideways and I caught myself but I went all the way down . . . but I . . . after that . . . I . . . you know, I just pulled the . . . outside ligaments."[2]

Claimant's right knee pain worsened, and Dr. Simon put him in a brace. Claimant eventually saw a specialist, Dr. John Estivo, who ordered x-rays and an MRI. Claimant said that Dr. Estivo wants to do arthroscopic surgery on his right knee.

Claimant admitted that he bowls regularly in a league and had bowled in league play until the end of the season in April. In the first part of May, he bowled in the state tournament, bowling six games. He admitted that bowling six games aggravated his knee "[a] little bit."[3] Claimant also stated he bowled two games in a charity event some time after his injury.

Mr. Young testified that on April 7, 2006, he saw claimant limping and asked him what happened. Claimant told him that he was walking and his knee popped. At no time did claimant say that he was stepping on or over a conveyor at the time his knee started giving him problems or even that the knee problem had started while he was at work. If claimant had told him the injury happened at work, Mr. Young would have prepared a report. Mr. Young said that several weeks later he saw claimant, who was limping badly and was obviously in pain. Claimant told him that he had bowled in the state tournament the weekend before. Mr. Young suggested to claimant that he not bowl again until his knee healed.

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[1] P.H. Trans., Resp. Ex. 1.

[2] P.H. Trans., Cl. Ex. 2 at 1.

[3] P.H. Trans. at 23.

Ms. Poer testified that on April 7, 2006, claimant came into Health Services and stated that he was walking into work when he heard a pop. Claimant told her that he had no specific injury. Ms. Poer assumed he was in the parking lot when the popping occurred because he had told her he was walking into work. At no time did claimant tell her that he was stepping over or on a conveyor while walking. She asked claimant if he had stumbled, fallen, or in any way twisted his knee, and he denied all those scenarios. Ms. Poer wrapped his knee with an Ace bandage, although she noted no swelling or bruising. She then told him that he should see his personal physician.

Later that same day, Ms. Poer received a call from claimant's wife, who questioned why claimant was told to see his personal physician since he was in the parking lot when the injury occurred and the "going and coming" rule would apply. Ms. Poer advised claimant's wife that since claimant said he did not stumble, twist, or fall, there was no accident and the occurrence was an "activity of daily living."[4]

Claimant's wife admitted calling Ms. Poer but denied saying that claimant had injured himself in the parking lot. She said she told Ms. Poer that claimant had been injured at the time clock. Mrs. Casey further testified that her husband had never had any prior knee problems nor had he been treated by any physician for knee pain before April 7, 2006.

After hearing all the witnesses and considering the evidence, the ALJ determined:

> 4. Respondent argues that the company nurse, claimant's supervisor and the nurse at the doctor's office all agree that claimant indicated that he hurt his knee while walking and that he did not trip, slip, or fall to the ground. Respondent argues that claimant's activity of walking is an activity of daily living and that K.S.A. 44-508(e) specifically excludes disability resulting from "the normal activities of day-to-day living."
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> 5. After reviewing the evidence, the court does not find that claimant was walking and twisted his knee as an activity of day-to-day living. The court is persuaded by claimant's testimony that he did in fact step over a conveyer and twisted his knee when he stepped down.
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> 6. Claimant testified that he told the same story to each witness but that his supervisor and the two nurses only wrote down part of his explanation. The insurance company representative taped her conversation with claimant and recorded the entire incident as described by claimant.
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> 7. The court concludes that claimant has established that it is more probably true than not true that he was injured while working for the respondent and that his injury arose out of and in the course of his employment.[5]

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[4] P.H. Trans. at 38.

[5] ALJ's Order dated Aug. 14, 2006, at 2.

This case presents a close question of fact as to how the claimant was injured. There is contradictory testimony about the alleged accident, the mechanism of injury, and what was said to whom. In her Order, Judge Barnes does not specifically say that she finds the claimant's testimony to be the most credible, but that is the obvious implication. The Board generally gives some deference to an ALJ's determination of credibility when, as in this case, the ALJ had the opportunity to observe the witnesses testify in person. With that in mind, this Board Member has reviewed the testimony and agrees with the ALJ's findings and conclusions.

Claimant's injury occurred while he was walking and stepping down from a small height at work. He stepped down off a conveyor and twisted his knee. Because the accident occurred while claimant was at work and on his employer's premises, the accident occurred in the course of claimant's employment. However, the accident must also arise out of the employment before it is compensable under the Kansas Workers Compensation Act.[6]

The phrase "out of" employment points to the cause or origin of the worker's accident and requires some causal connection between the accident and the employment. An accidental injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the resulting injury. An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[7]

In *Hensley*[8], the Kansas Supreme Court adopted a risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the worker; and (3) neutral risks which have no particular employment or personal character. According to 1 Larson, *The Law of Workmen's Compensation*, Sec. 7.04, the majority of jurisdictions compensate workers who are injured in unexplained falls upon the basis that an unexplained fall is a neutral risk and would not have otherwise occurred at work if claimant had not been working. The injury in this case was not the result of a fall, it was a misstep and twisting of the knee. And it was not unexplained, it resulted from stepping down from a walkway over a conveyor. Accordingly, it resulted from a risk associated with the job.

Although walking can be described as a normal activity of day-to-day living, K.S.A. 2005 Supp. 44-508(e) does not exclude "accidents" that are the result of such activity, but rather excludes injuries where the "disability" is a result of the natural aging process or the normal activities of day-to-day living. The intent of this statute is to avoid paying workers compensation benefits for conditions that result from risks that are solely personal to the

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[6] *See Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[8] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

worker.[9] Such was not the situation in this case. Claimant had no history of knee problems. Had claimant not been employed as he was, he would not have been equally exposed to the risk that ultimately caused his injury.[10]

Finally, respondent argues that it should be relieved of any liability for this accident because claimant suffered a subsequent injury while bowling. The only evidence of this is claimant's statement that his subsequent bowling activities aggravated his symptoms a little bit. There is no evidence that bowling caused further injury or made his condition permanently worse. Without more evidence, such as a causation opinion from a medical expert, respondent has failed to prove a subsequent intervening injury occurred.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[11] And unlike appeals from preliminary hearing orders which are decided by a single Board Member, appeals from final awards are determined by the entire Board.

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated August 14, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2006.

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BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
Vincent A. Burnett, Attorney for Self-insured Respondent
Nelsonna Potts Barnes, Administrative Law Judge

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[9] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972); *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002); *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

[10] See *Anderson*, 31 Kan. App. 2d at 11.

[11] K.S.A. 44-534a(a)(2).